(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 520

ALLEN POPE, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

MOTION FOR LEAVE TO FILE AND SECOND PETITION FOR REHEARING

on

Petition for Writ of Certiorari to the Court of Claims Denied January 2, 1946.

ALLEN POPE,
Pro se.

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Petition for Writ of Certiorari to the Court of Claims Denied January 2, 1946.

MOTION FOR LEAVE TO FILE.

Now comes petitioner, Allen Pope, *pro se,* and respectfully moves this Honorable Court for leave to file a second petition for rehearing on his petition for issuance of writ of certiorari to the Court of Claims to review that court's judgment of October 1, 1945, 62 Fed. Sup. 408, the said petition having been denied here January 2, 1946, and petition for rehearing having been denied February 4, 1946. The reasons for this motion appear in the petition below. This motion is presented in good faith and not for delay.

Respectfully submitted,

ALLEN POPE.

SECOND PETITION FOR REHEARING ON

Petition for Writ of Certiorari to the Court of Claims Denied January 2, 1946.

Now comes petitioner, Allen Pope, *pro se*, and, leave being granted by the Court as above requested, for the second time prays that rehearing be granted on his petition for issuance of writ of certiorari to the Court of Claims to review that court's judgment in the above entitled case rendered, October 1, 1945, in response to the mandate of this Court of December 5, 1944 (323 U. S. 1); that, thereupon, this Court's orders of January 2, 1946, and February 4, 1946, be vacated; the same respectively denying the petition for certiorari and the first petition for rehearing thereon; and that the petition for certiorari be granted and restored to the docket.

OPINION BELOW.

The opinion of the Court of Claims is set out in full in the Transcript of the Record (R. 63-110). It is not yet officially reported in the Court of Claims Reports. It is reported in 62 Fed. Sup. 408.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, including the Act of May 22, 1939; and, further, under Section 4 of the Special Act of February 27, 1942 (R. 1). This Court has jurisdiction of its own judgments until end of term.

STATUTES INVOLVED.

The statutes involved are the Special Jurisdictional Act of February 27, 1942, 56 Stat. 1122, set out in full (R. 1-2); also the statutes relative to the general jurisdiction of the Court of Claims as set out in "The United States Code, 1940 Edition", Title 28, Chapter 7, §§ 241-291 thereof.

STATEMENT.

This is a second petition for a rehearing on a petition for a writ of certiorari to the Court of Claims to review their judgment of October 1, 1945, which was rendered in response to the mandate of this Court dated December 5, 1944. 323 U. S. 1.

This petition for rehearing is to be based upon three main points believed to have been overlooked or misapprehended because of generality of treatment and on account of confusion arising from intermingling of cases below. Nothing of course is reviewable here now except what has transpired since mandate. However, the bulk of the record sent up, 146 pages, deals almost exclusively with the prior and finally decided case based on the contract, which has nothing to do with the present case based on the Special Act. Whence, in order that the Court may clearly comprehend what the lower court has done since mandate and in order to orient the three main points for rehearing now to be made, a somewhat complete statement of all the proceedings in sequence is placed in the Appendix hereto. The statements in black face type at the head of each paragraph epitomize what is said therein. A glance at these statements will serve as background to what here follows.

The petition for certiorari presented but one question, and that a simple question, for the consideration of this Court, i. e., "whether the Court of Claims properly interpreted and applied the Special Act of February 27, 1942 (56 Stat. 1122) in accordance with the decision and mandate of this Court?"

Specifically, whether under the express obligation imposed by said law of Congress, the essential criteria therein established being met, the Court of Claims must render judgment for the work of excavating caved-in materials at the prior contract rate for excavation in accordance with the mandate?

> Sec. 2. The Court of Claims **is hereby directed to determine and render judgment** at the contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, * * * for the work of excavating materials which caved in over the tunnel arch.

In other words, the question is does that Section 2 of the Act mean what it says, the jurisdiction conferred on the court by Section 1 being restricted

> to hear, determine, and render judgment upon the claims * * * as described and **in manner set out in section 2 hereof?**

Petitioner believes that this Court has already decided this question in unmistakable language in its decision of November 6, 1944, and that in this respect the lower court has failed to carry out the mandate of December 5, 1944, thereon. If the situation be thus and the lower court has determined all the criteria, and there is nothing to do but actually render judgment, judgment should issue.

This Court held that in the Special Act Congress imposed on the Government a legally binding obligation to pay petitioner's claims where no obligation existed before. 323 U. S. 1, 9-10. The Court explained that Congress had exercised its constitutional authority by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims. The mandate of December 5, 1944, required the lower court to render judgment accordingly. In net effect, the lower court has denied that obligation. It reverted to the prior contract "where no obligation existed before" and on such basis held that there is no obligation to pay for this work now. For reasons not indicated, except that those advanced by respondent may have prevailed, this Court declined to review the judgment below

on certiorari January 2, 1946. Similarly petition for rehearing was denied on February 4, 1946.

Last Chance: If that right expressly given petitioner by the Special Act cannot find vindication in this Court now, it has no chance here later nor elsewhere. This is the court of last resort. This Court has threefold jurisdiction: (1) It has jurisdiction under the Constitution, Articles III and VI thereof. The Special Act upon which the case rests is a law of Congress which already (323 U. S. 1) has been declared here as made in pursuance of the Constitution. (2) The Congress in the Special Act, Sec. 4, regulates the constitutional jurisdiction by providing that this Court may review on certiorari any decision based on said Act. (3) This Court may construe its own mandate. This is petitioner's last chance in this Court.

Petitioner's counsel, for financial reasons, withdrew his appearance in this case two weeks after certiorari was denied. Petitioner, an engineer, not a lawyer, had but a week within which to prepare, print, serve, and submit his first petition for rehearing. Counsel had considered that, the question being the interpretation of the Special Act and failure to comply with mandate, the petition for certiorari would certainly be granted. Petitioner, not being a member of the bar whose statements might be taken at word, feels impelled to demonstrate the basis for statements herein made but tries to avoid argument. The citations to cases are primarily for illustration of principle.

GROUNDS FOR REHEARING.

POINT NO. 1.

The first point believed overlooked as probably warranting grant of rehearing is:

The lower court found, unanimously, all the ultimate facts essential to judgment for recovery for the work of excavating the materials which caved in over the tunnel arch as prescribed by the Special Act, yet denied recovery.

Finding 8 (R. 67) states that this work was useful and beneficial to the Government and has not been paid for. The contract rate for excavation is set out in Finding 6 (R. 65) as $17.00 per cubic yard. Finding 5 (R. 65), second paragraph, shows, in the manner prescribed by the Act, the total volume of caved-in space as 5,561 cubic yards. Findings 1 and 3 (R. 64) show that 723 cubic yards of such excavation were previously paid for. Findings 2 and 3 show 57 cubic yards allowed for in the present judgment, which, with the 723 cubic yards, leaves 4,781 cubic yards unpaid for, which, at $17.00 per cubic yard, amounts to $81,277.00. These are all the criteria established by the Special Act.

These findings are based on the evidence and the report of a commissioner and upon hearing before the court to whom the case was submitted on oral argument (R. 63). These findings respecting the excavation of caved in material are responsive to the pleadings of the parties (R. 3, 6, 8, 47). They are responsive to this Court's mandate of December 5, 1944. Under the restricted jurisdiction granted the lower court by Section 1 of the Act to adjudicate **in the manner set out in section 2** and where, by Section 2 the Court of Claims is **directed to determine and render judgment,** judgment was mandatory. The Act is exclusive; the way it prescribes and no other. Judgment should have been so rendered. The mandate is construed to so order. Whence, the lower court, otherwise having determined everything and leaving nothing to be done except judgment to be entered, a writ of mandamus may be proper. *In re Potts, Petitioner*, 166 U. S. 263, 265. Other aspects indicate certiorari proper mode.

POINT NO. 2.

The second point believed overlooked or misapprehended and warranting rehearing is:

The majority below, outside of any jurisdiction conferred by the Special Act, made Special Finding of Fact construing the prior contract as not entitling petitioner to separate

payment thereunder for excavating caved-in materials, and, upon that basis, denied recovery for excavating caved-in materials as authorized by the Special Act. The court found by adding the following clause to the last sentence of finding 8 (R. 67):

> but, as to the work of disposing of the materials which caved in from the top of the tunnel, the plaintiff will have been paid for that work what he expected to receive under the contract and what he was entitled to receive at contract rates, when he is paid the contract rates for dry packing and grouting the spaces left by the cave-ins.

This finding is the crux of the case as decided below. Upon its authority, the majority concluded as matter of law that petitioner was not entitled to be paid for excavation of caved-in materials authorized by the Special Act, and thereupon refused judgment therefor. Except for this finding, judgment for said excavation would have been mandatory under the findings otherwise made. In other words, it is the issue which was decisive of the case below. It is wrong from every aspect: It is not based on evidence, nor on the commissioner's report, nor given upon the regular manner of hearing. It is contrary to Special Findings of Fact of the old contract itself. It conflicts with prior controlling decisions. It conflicts with other findings in the same judgment awarding large amounts for excavation of caved-in materials. It is contrary to and outside the jurisdiction of the restrictive mandate. Likewise it is contrary to what the Special Act authorizes and outside of the jurisdiction conferred. It is not a finding of fact. Neither is it a conclusion of law. It is irrelevant under the Act. These various aspects are exhibited next below.

(2a) This finding construing the prior contract is not based on evidence. There are no sustaining, evidenciary findings. The old contract itself is made part of the record, not as evidence but as findings, of which circumstance

special comment is made below. Finding 7 sets out provisions 48, 58 and 62 (R. 65, 66). Finding 1 sets out the whole contract by reference (R. 9-47). No evidence could transcend the contract. It may not be shown that the contract differed from that contained in the writing. *Labonte* v. *Lacasse*, 78 N. H. 489, 491. No part of the contract, neither par. 58 nor 62, states or implies that payments for drypacking and grout will pay for excavation of caved-in material. No part of the contract contemplated cave-ins. It contemplated solid rock. The lower court entirely misconceives the purpose of dry packing and grout. The absurdity is that no dry packing and grout were required to be filled into any space, caved-in space, space vacated by timbers, or other.

(2b) This finding 8, purporting to state petitioner's expectations and the meaning of the old contract, is not based on the commissioner's report. The commissioner's report is set out in full in Petitioner's Supplemental Brief, Case No. 26, October Term 1944, appendix thereto, pp. 34-37.

(2c) The finding is not based on hearing by the Court of Claims in the sense that it is the result of a three to two decision, one of the majority not having heard the oral arguments and having been absent for nearly three years. This point is not emphasized here having been previously presented to the Court in Petition for Rehearing denied February 4, 1946.

(2d) Special Findings 1 and 7, being the prior contract provisions, show, on the principle of the Clark Case, that Finding 8, as to what those provisions mean, is wrong. In the Clark Case, 96 U. S. 37, the lower court having found all the facts essential to judgment, sent up, not as evidence, but as Special Finding of Fact the documentary record of a court martial presumed to sustain another Special Finding of Fact, the crux of the case. This Court held that in law the former showed the latter to be wrong. In the

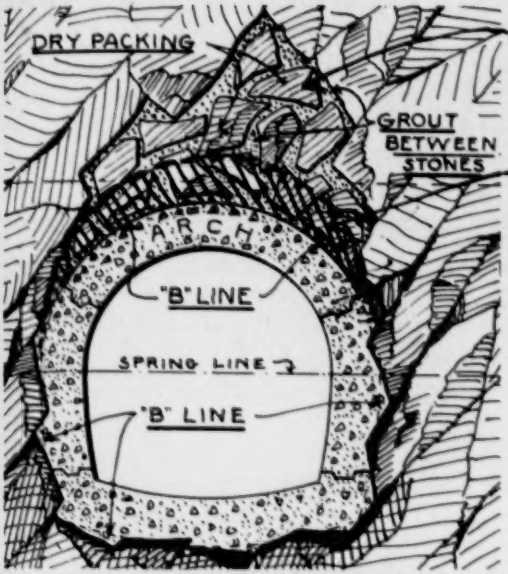
present case, the lower court made Special Finding of Fact 8 purporting to interpret the old contract provisions, the crux upon which recovery was denied. It made Special Finding of Fact 7 being the contract provisions. Finding 1 made Special Finding of Fact of the whole contract. Findings 1 and 7 show that in law the interpretation of the lower court in Finding 8 is wrong. See Appendix, par. (13).

(2e) This finding and decision thereon conflict with a prior controlling decision made in the same court, M. A. Long Company v. The United States, 79 Ct. Cls. 656, 666. The cited case was based on contract provisions identical with those upon which petitioner's case K-366 was based. They included provisions restricting payments for excavation to the area within the "B" pay line and for dry packing and grout. The project was another tunnel, designed by and constructed under the same officials. The roof there also caved in; suit for the excavation of the caved-in materials resulting. The court below there held that the excavation of the caved-in materials was not contract work but work outside the contract. It awarded judgment on *quantum meruit* on an implied contract. Here it held excavation of caved-in material to be contract work in the sense that it would be paid for by payments made for drypacking and grout filled into the caved-in spaces, the drypacking and grout definitely being contract work. What odd after-the-fact reasoning! Under par. 58 there could be no payments for excavation of materials from outside the "B" line, but tickle the roof a little and cause it to fall in and get paid for the additional excavation as well as more drypacking and grout. See Appendix hereto, par. (2). In the Special Act herein, the Congress in its own judgment fixed the prior contract rate for excavation as basis for payment.

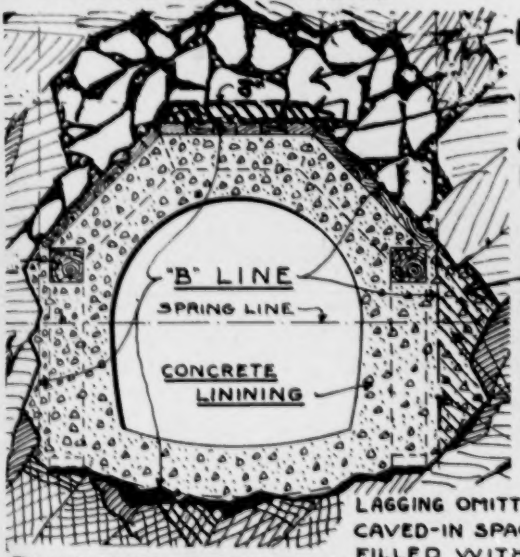
(2f) This finding interpreting the old contract conflicts with other findings and the awards thereon under this pres-

ent judgment. See sketch opposite. The lower court awarded judgment for 57 cubic yards of caved-in material at the contract rate, Finding 2 (R. 64). It also awarded for the dry packing and grouting which refilled that caved in space, Finding 5 (R. 65). It previously awarded for 723 cubic yards of caved-in excavation, Findings 1 and 2 (R. 64). It here allows for the dry packing and the corresponding grout which filled that much caved-in space in the rock sections. All payments were at the contract rates. It also found that the side walls had caved-in, likewise outside the agreed pay line, and payment for 287 cubic yards of excavation at the contract rate was awarded. This space was refilled with concrete also awarded at the contract rate, Finding 2 (R. 64). See Appendix, par. (2). These three instances in this judgment cover awards for 1067 cubic yards of excavation of caved-in materials at $17.00 per cubic yard amounting to $18,139, which caved-in spaces were refilled with drypacking and grout or with concrete in like amount. Yet the lower court refused award for the rest of the identically similar excavation of caved-in materials of which admittedly the Government has had the use and benefit and has not paid.

(2g) After the mandate, the lower court was restricted to what it had theretofore decided and what this Court had passed upon. It had first held (R. 50) that the meaning of the Special Act was plain and unambiguous, and that it was mandatory, if the Act were constitutional, that the lower court award for this item of excavation $81,277.00, the criteria specified having been met (R. 55). This Court ruled on the matter, 323 U. S. 1, 11; holding that "petitioner has sought to enforce the obligation, which the Government has assumed, to pay him for work done and not paid for. Congress has in effect consented to judgment in an amount to be ascertained by reference to the specified data." Thereafter, the lower court disregarded what it had held before and what this Court had decided, and un-



UNTIMBERED SECTIONS



TIMBERED SECTIONS

INCONSISTENT AWARDS FOR EXCAVATION OF CAVED-IN MATERIALS OUTSIDE "B" LINE

dertook anew to explore the old contract intermeddling where it was not authorized. *In re Potts, Petitioner,* 166 U. S. 263, 265. Not only has the lower court virtually overturned the Supreme Court, it went out of its jurisdiction in so doing.

(2h) This asserted "Special Finding of Fact" No. 8, construing the old contract, appears to be not a finding of fact but rather a misplaced conclusion of law. It is only a statement of fact in that it purports to state something, the meaning of an old document. A statement of what petitioner was entitled to receive under the old contract is a conclusion of law thereon. No jurisdiction is given the lower court by the Special Act to decide the meaning of the old contract and to apply it here. The lower court did not decide this particular matter in prior case No. K-366 when it had jurisdiction. May it construe it here when it has no jurisdiction to do so? A statement of what the court had actually found as a conclusion of law in the prior case might properly be included in findings here but this is not such an instance. Here the lower court, with no authority whatever, neither express nor implied, has stated out of hand, without reference to any part of the old contract, what petitioner was entitled to receive thereunder and on that kind of a finding decided the case.

POINT NO. 3.

The third point believed misapprehended and warranting grant of rehearing turns on the manner in which the lower court made decision on this question of payment for caved-in materials. This is not a rediscussion of what has been said in the petitions heretofore. Four judges heard the trial and agreed on everything, on all the facts and all the law, essential to judgment for all four of the items of claim authorized to be sued for by the Special Act. However, as to the item of excavation of caved-in materials, two of the judges insisted on making an additional finding of fact and

conclusion of law thereon, both quite *dehors* the Special Act, construing a contract which was basis of a prior and finally concluded suit, all actually irrelevant. Three of the four judges could not concur. Without giving notice to the parties and without reargument, the fifth member of the court, theretofore absent, joined with the said two to form a concurring majority of three and agreed to the extraneous finding of fact construing the old contract and thereupon denied the claim for the excavation of the caved-in materials. Whence point No. 3 is:

A balance of power exists between the lower court and this Court by virtue of Section 3 (a) and Section 3 (b) of the Act of February 13, 1925, which should be exercised for benefit of litigants in the lower court of first instance with respect of decisions of questions of law essential to "the proper disposition of a case," and the fact that the lower court neither granted a rehearing before the fifth judge and did not certify the disputed question under Sec. 3 (a) is warrant for this Court to grant certiorari under Sec. 3 (b). There was no hearing as required by rule of court and by law. There was no concurrence as required by law.

When the Congress, upon the representations of members of this Court, "abolished" the right of appeal to the Supreme Court from judgments of the Court of Claims and substituted, in lieu thereof, a review on certiorari by Section 3 (b) of the Act of February 13, 1925, it was intended and expected that the Court of Claims would make use of Section 3 (a) thereof and certify to this Court questions of law concerning which instructions were desired *for the proper disposition of a case.* While that authorization appears merely permissive in aid of the court, not obligatory, it was not intended that rights of claimants in that court to the fundamental American tradition of having at least one review of their cases should be completely forfeit. It was intended that by the combination of certification and

certiorari some of the essentials of the individual's rights to review should be retained. Every question in the Court of Claims, as a court of first instance, which might warrant review in a higher court, if there were such, is not a question of great national importance to be in the category of cases reviewable here. Thus it is possible, by the refusal or failure of the Court of Claims to decide or to certify, to squeeze out entirely, forever, what the Congress considered as the fundamental American rights of litigants even in that court.

It seems, from the language of the Act and from the testimony given at the hearings in Congress thereon, that in abolishing the right of appeal, it was intended that some balance be observed between certification and certiorari such as to "preserve" so much of that traditional American right to at least one review as would provide "for the proper disposition of a case". See testimony of Mr. Justice Sutherland, Senate subcommittee of the Committee on the Judiciary hearings on S. 2060, 68th Congress, 1st Session, February 2, 1924, p. 37 thereof; also pp. 38, 39, 47, Senator Spencer, Mr. Justice Van Devanter, Mr. Justice Sutherland. See also other hearings and reports in connection with this Act, e. g., Serial 45 Judiciary Com. House of Representatives on H. R. 8206, 68th Cong., 2nd Session, December 18, 1924, pp. 15, 17, note especially Mr. Sumners, Mr. Justice Van Devanter. Also see Senate Report No. 362 on S. 2060, 68th Cong., 1st, April 7, 1924; House Report No. 1075 on H. R. 8206, 68th Cong., 2nd, Jan. 6, 1925; Confidential Print. Senate Judiciary, Letter Chief Justice Taft, March 11, 1922, on S. 3164, 67th Cong., 2nd Sess. Also Wm. Howard Taft, 35 Yale Law Journal, 1, 9.

Was there no duty below to grant a rehearing before the judges who were to decide the case, or else to certify? That neither was done would seem to warrant certiorari.

This Point No. 3 is aimed principally at the validity of the judgment. It is contended that the judgment is not a judgment at all; that it is invalid by reason of lack of re-

quired concurrence and lack of real hearing. This is the question of the "how" of the case, the question of procedural or adjective law raised simultaneously by the four decisions below of October 1, 1945, of which the present case was one.

The statute controlling decisions of the Court of Claims provides "that the concurrence of three judges shall be necessary to a decision in any case," Rule 75 (b) of the Court of Claims, originally promulgated by the Supreme Court, now retained by the lower court of its own authority under the revised statute, provides that that court's "special findings shall be in the nature of a special verdict." This is a technical legal phrase and has great import here. The *nisi prius* in the Court of Claims is the body of judges who hear and try the case. They serve as a jury. Statute provides they may be the full bench of five, but not less than three. This is a legislative court, not a constitutional court. While a jury of twelve is done away with, virtually a jury of at least three is substituted, and, it is believed, the essential requisites for jurors, juries, hearings, hearing of oral arguments, independent judgments thereon, not the hearsay of other jurors, unanimous concurrence of the triers, and all the connotations of the words, trial, verdicts, and special verdicts, are here retained.

Verdict: *Roberts* v. *State*, 159 So. 373, 374; 26 Ala. App. 331. *State* v. *Ivanhoe*, 57 P. 317, 320; 35 Or. 150. 44 Words and Phrases 131. 27 Ruling Case Law, 834, § 2.

Special Verdict: *Hutchison* v. *Kelley*, 1 Rob. (Va.) 123. *Davis* v. *Chicago etc. R. Co.*, 93 Wis. 470. 24 LRA (N. S.) 1. Bouvier's Law Dictionary pp. 3392, 3393. *United States* v. *Clark*, 94 U. S. 73, 75. *Collins* v. *Riley*, 104 U. S. 322, 327. *Ward* v. *Cochran*, 150 U. S. 597, 608. *United States* v. *New York Indians*, 173 U. S. 464, 474 and a number of cases there cited. *United States* v. *Esnault Pelterie*, 299 U. S. 201, 205. Do 303 U. S. 26, 28, 29, 30 and numerous citations there. *Natron Soda Co.* v. *The United States*, 55 Ct. Cls. 66, 67. Clementson "Special Verdicts".

Concurrence of judges: Unanimous verdict: *Denver & Rio Grand R. Co.* v. *Burchard*, 35 Col. 539, 9 Ann. Cas. 994. *Capital Traction* v. *Hof*, 174 U. S. 1, 15. *Ebbing* v. *Borough of Schuylkill Haven*, 244 Pa. 505.

Juror. Jury. 23 Words and Phrases 419, 423. *State* v. *Potts*, 20 Nev. 389. *State* v. *Voorhies*, 12 Wash. 53. *State* v. *McCarthy*, 76 NJL 295.

Submission: *Ridgely* v. *Carey, Md.*, 4 Har. & McH. 167, 174.

Hearing includes oral argument: Trial ditto: *People* v. *Raco*, 47 N. Y. S. 2d, 448, 449. *Freeman* v. *United States*, CCANY, 227 F. 732, 743. *Chaffee* v. *Rahr*, 40 NYS 2d, 484, 488. *State ex rel Arnold* v. *Common Council*, 157 Wisc. 505, 510-512. *Wisconsin Telephone Co.* v. *Public Service Com.*, 232 Wisc. 274, 294. *Mason* v. *State*, 26 Ohio CC 535. *Barton* v. *Burbank*, 138 La. 997. *Durden* v. *People*, 192 Ill. 493. *Clanton* v. *Ryan*, 14 Colo. 419, 424. *McKenney* v. *Wood*, 108 Me. 335, 337. *Labonte* v. *Lacasse*, 78 N. H. 489, 490. *Bridges* v. *California*, 314 U. S. 252, 271.

CERTIFICATE OF GOOD FAITH.

This second petition for rehearing is presented in good faith and not for purpose of delay.

CONCLUSION.

Rehearing should be granted because, it is believed, important matters decisive of the case have been overlooked or misapprehended; and conflicts with controlling decisions, through inadvertance, were not drawn to the attention of this court:

The lower court has found, unanimously, all the ultimate facts essential to judgment under the Special Act and under the mandate but denied judgment. A ruling of the Court on this aspect should dispose of the case.

The lower court went outside of its jurisdiction under the Act and under the mandate to make finding of fact

construing an old contract, the deficiency or mischief of which the Special Act was designed to remedy; and on that basis, "where no obligation existed before", it held that no obligation exists now to pay for the contested item of excavation of caved-in materials. A ruling on that simple question should also dispose of the case.

The latter action below is wrong from whatever point it may be viewed. Not made with authority. Not based on evidence. Not based on commissioner's report. Not made upon regular manner of hearing. It is wrong on the principle of the *Clark Case*, 96 U. S. 37. It directly conflicts with controlling decision on the identical point decided in the *M. A. Long Case*, 79 Ct. Cls. 656, 666. It conflicts with other parts of the instant judgment where awards were made for excavation of 1017 cubic yards of caved-in material, but not for 4781 cubic yards also authorized.

A balance of power exists between the Court of Claims and this Court by virtue of Sections 3 (a) and 3 (b) of the Act of February 13, 1925, which should be exercised for the benefit of the litigant in the Court of Claims where four triers of his case disagree on a point of law essential to the disposition of the case. Since the lower court decided by bringing in a fifth judge, who was not present, and did not afford opportunity for reargument, and did not certify the question here, this Court, it seems to petitioner upon careful review of the record on the Act of February 13, 1925, is under obligation to grant certiorari. Petitioner recognizes that even though there is no review of the judgments of the Court of Claims as there is for every other Federal court, the law must be taken as it stands. It is possible upon examination of the record to view the matter as set out herein. It is so serious that ruling of this Court thereon appears necessary.

The absentee judge did not bring to the case the kind of hearing that is required by rule of court or by law. Neither was there concurrence as required by law.

There are intervening pending cases on Point No. 3.

All of petitioner's capital expended for the benefit of the United States is involved.

The question presented in the petition for certiorari involves more than its mild statement indicates. This Court sould recognize that this question really imports matters far transcending petitioner's personal interests; that his questions here presented are but the symbols of the problems of a great body of litigants, especially such as all who are obliged to bring their cases to the Court of Claims, those whose cases rest on Special Acts, or contracts, those whose cases are to be ultimately disposed of after mandates of this Court. The questions have for wider application than merely Court of Claims cases; whether a decision may stand which conflicts with an express statute, or conflicts with a prior controlling decision, or actually conflicts with itself; whether any court may disregard this Court's mandate; whether a judge who is obliged by code and by express statute to hear and is absent, yet may decide the facts, the law, and give judgment; whether there is not a balance of power between the Court of Claims and this Court to be exercised in favor of the litigant. Some of these questions are novel. They are all important. They are matters of substance. They are Federal in nature. They should be decided.

As for petitioner, this is his last chance.

It is respectfully urged that this petition for rehearing and the petition for certiorari be granted.

Respectfully submitted,

ALLEN POPE.